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No. 00-795

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE FREE SPEECH COALITION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Court held that visual depictions of live sexual performances by minors are unprotected by the First Amendment. The Court reasoned that the "evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake," that "it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 763-764. The prohibitions in the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. 2252A, 2256(8) (Supp. V 1999), apply to visual depictions of actual minors engaged in sexually explicit conduct. *United States* v. *Hilton*, 167 F.3d 61, 66 (1st Cir.), cert. denied, 528 U.S. 844 (1999). They also cover a narrow category of additional depictions—those that

Congress found to be "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). As in *Ferber*, the "evil to be restricted" in that category of material "overwhelmingly outweighs the expressive interests, if any, at stake." 458 U.S. at 763-764. Thus, that category of material is also unprotected by the First Amendment.

A. *Ferber Does Not Protect The Covered Material*

Respondents contend (Br. 22-23) that the depictions banned by the CPPA are "exactly the type of depictions held in *Ferber* to be protected by the First Amendment." *Ferber*'s sole *holding*, however, was that the government may regulate visual depictions of actual minors engaged in sexually explicit conduct. Because the particular state statute at issue in *Ferber* applied only to such depictions, the Court had no occasion to resolve the question whether the government also may regulate material that is "virtually indistinguishable" from depictions of real minors engaged in sexually explicit conduct. Indeed, at the time of *Ferber*, the computer technology for producing such images had not yet emerged.

In support of their argument that the material covered by the CPPA is constitutionally protected under *Ferber*, respondents rely (Br. 22) on the following statement from that decision: "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." 458 U.S. at 764-765. That statement, however, is best understood in the context of a discussion of *Miller* v. *California*, 413 U.S. 15 (1973), as referring to the protection that the First Amendment extends to such material as written works, artistic drawings,

paintings, sculptures, and cartoons, not to material that is "virtually indistinguishable" from depictions of actual children engaged in sexually explicit conduct. *United States* v. *Mento*, 231 F.3d 912, 919 n.8 (4th Cir. 2000), petition for cert. pending, No. 00-8114 (filed Jan. 22, 2001). Respondents' far broader reading ignores the Court's observation, with apparent approval, that at the time of the decision in *Ferber*, the child pornography laws of two States had defined a child as "a person under age 16 or who appears as a prepubescent," and the law of another State had defined a child as "one who is or appears to be under 16." 458 U.S. at 764 n.17. Read together, the two statements suggest the very line that Congress drew in the CPPA: It covered depictions that appear to be actual minors engaged in sexually explicit conduct, but it excluded from coverage written descriptions and artistic conceptions of minors that do not have the realism of photographs.

Respondents' focus on a single isolated statement in *Ferber* also misses the critical point of that decision—that material is categorically unprotected by the First Amendment when the government's interest in preventing the evils associated with it "overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber*, 458 U.S. at 763-764. That mode of analysis, rather than any single statement in the opinion, governs the resolution of the question presented here.

B. *The Covered Material Has Little, If Any, Value*

1. Respondents argue (Br. 17-20, 29-30, 39-41) that the prohibitions in the CPPA of material that depicts conduct that "appears to be" and "conveys the impression" of "a minor engaging in sexually explicit conduct" cover a vast amount of material that has serious value. Here, as in *Ferber*, however, the value of the material that is actually covered by the prohibitions is "exceedingly modest, if not *de*

minimis." 458 U.S. at 762. It is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-763.

To the extent that there might be a legitimate objective in a rare case to depict minors engaged in sexually explicit conduct, it can be done consistently with the CPPA. Because the CPPA reaches only material that is "virtually indistinguishable" from photographs of actual minors engaged in sexually explicit conduct, artistic conceptions—drawings, paintings, sculptures, and cartoons—are not prohibited. In addition, by virtue of the CPPA's affirmative defense, depictions of youthful-looking adults are also permissible, as long as the creators and distributors of such material do not "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(c)(3) (Supp. V 1999). That defense protects the use of adults in sexually explicit depictions, as long as "the material has not been pandered as child pornography." S. Rep. No. 358, 104th Cong., 2d Sess. 10 (1996).

Because the CPPA does not cover artistic conceptions of minors engaged in sexually explicit conduct or depictions of adults engaged in sexually explicit conduct that are not pandered as child pornography, its prohibitions do not facially trigger serious First Amendment concerns. The material that is subject to prosecution under the "appears to be" and the "conveys the impression" prohibitions consists largely of realistic, sexually explicit images of pre-pubescent minors or of persons who otherwise clearly appear to be under the age of 18. *Hilton*, 167 F.3d at 73. Such material is catered to pedophiles, and has little or no serious value. *Ibid.*

2. In an effort to avoid the conclusion that the CPPA covers material that has little or no value, respondents interpret the Act to encompass a far broader range of materials. In particular, respondents contend (Br. 17-20) that the CPPA is not limited to visual depictions that are virtually indistinguishable from photographs of real children, but also covers drawings, paintings, sculptures, and cartoons. Respondents base that interpretation on the CPPA's coverage of "any visual depiction * * * whether made or produced by electronic, mechanical, or other means." 18 U.S.C. 2256(8) (Supp. V 1999). But in order to be subject to the prohibitions at issue, a visual depiction, however made or produced, must "*appear[] to be*" of a "*minor* engaging in sexually explicit conduct," or must be pandered "in such a manner that *conveys the impression* that the material is or contains a visual depiction of a *minor* engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B) and (D) (Supp. V 1999) (emphasis added). In legislative findings, Congress clarified that a depiction falls within those definitions only if it is "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5); see also 18 U.S.C. 2251 note (Supp. V 1999) (Findings 8, 9, 13).

Respondents argue (Br. 19) that the statutory findings have no relevance in interpreting the CPPA's prohibitions. This Court, however, has expressly relied on statutory findings to determine the meaning of the substantive provisions of an Act of Congress. *Olmstead* v. *L.C.*, 527 U.S. 581, 600 (1999); *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 484-487 (1999). Moreover, the background of the CPPA supports the same interpretation. Before enactment of the CPPA, Congress regulated only depictions of *actual* minors engaged in sexually explicit conduct. Against that background, the phrase "appears to be[]" of a "minor engaging in sexually

explicit conduct" necessarily refers to realistic depictions that appear to use actual minors in their production. The Senate Report specifically explains that the new prohibitions apply "to the same type of photographic images *already* prohibited, but which does not require the use of an actual minor in its production." S. Rep. No. 358, *supra*, at 21.

3. Respondents also contend (Br. 29-30) that the Act prohibits non-obscene depictions of youthful-looking adults engaged in sexually explicit conduct. The Act's affirmative defense, however, expressly permits the creation of such depictions, provided they are not pandered to convey the impression that actual minors were used in their production. 18 U.S.C. 2252A(c)(3) (Supp. V 1999). Respondents' dire predictions (Br. 29-30) about the effect of the CPPA on movies ignores the affirmative defense. By virtue of the defense, film makers may use adults as actors and body doubles in non-obscene movies that depict teen sexual activity, as long as they refrain from pandering the movies to convey the impression that the *actors* used in the sexually explicit scenes are, in fact, minors. Similarly, films may be promoted as works about teen sexual activity, as long as they are not promoted to convey the impression that the *actors* involved in the sexually explicit scenes are minors.

Respondents apparently assume (Br. 29-30) that including a scene in a movie in which an underage *character* engages sexually explicit conduct itself constitutes impermissible pandering. A reasonable viewer of movies, however, is aware that adults are often used to portray minors and to act as body doubles in films about teen sexuality. Thus, the creation of a scene in which an underage character engages in sexually explicit conduct does not in itself constitute impermissible pandering. For the same reason, promoting a film as one about teen sexuality does not constitute impermissible pandering. Film makers and distributors lose the affirmative defense only if they affirmatively convey the

impression that the *actor* in a sexually explicit scene is a minor.[1]

C. *The Governmental Interests Are Compelling*

Respondents contend (Br. 25) that the governmental interests supporting the "appears to be" and "conveys the impression" prohibitions do not rise to the same level as the interest at stake in *Ferber*. The CPPA, however, is supported by the same interest supporting the state law upheld in *Ferber*, and the other interests supporting the CPPA are just as compelling.

1. One compelling interest supporting the "appears to be" and "conveys the impression" prohibitions is precisely the same interest involved in *Ferber*—preventing the use of actual minors in sexually explicit depictions by shutting down the market for such depictions. 458 U.S. at 758-759. Because it is possible to produce computer images that are virtually indistinguishable from photographs of real minors engaged in sexually explicit conduct, a defendant charged with distributing or possessing depictions of real minors engaged in sexually explicit conduct can argue that the images may, in fact, be computer-generated. The government can refute that argument if it happens to be able to match the

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[1] It is not necessary to decide whether any of the movies cited by respondents (Br. 30, 44) would fall within the reach of the CPPA but for the affirmative defense. Those movies are not in the record and no evidence has been elicited about them. The question whether any particular movie would be covered by the CPPA absent the affirmative defense would depend on whether any scenes in the movies *depict* sexually explicit conduct as opposed to creating an understanding that sexually explicit conduct is occurring, and on whether any of the actors or actresses in sexually explicit scenes appear (beyond a reasonable doubt) to be minors, rather than adults portraying minors. While respondents represent that all the movies would be covered, they have failed to identify any scenes in which sexually explicit conduct, as defined in the CPPA, is depicted or any actors who appear to be minors.

depictions to pictures in pornographic magazines produced before the development of computer imaging software or if it can establish the identity of the victim. But in the many cases in which it is not possible to do one of those two things, the defendant has a built-in reasonable doubt argument that could thwart prosecutions. The "appears to be" and "conveys the impression" prohibitions close that loophole and ensure that those who distribute and possess depictions of real minors engaged in sexually explicit conduct will not escape prosecution and punishment. See S. Rep. No. 358, *supra*, at 16-17, 20.

Respondents argue (Br. 25) that, under *Ferber*, that rationale would be sufficient only if the government could establish that "the production of materials using actual children cannot be stopped without also banning the materials covered by the CPPA." Respondents further argue that the government failed to make such a showing. Respondents' argument cannot be reconciled with *Osborne* v. *Ohio*, 495 U.S. 103 (1990), or with the record before Congress.

In *Osborne*, the Court upheld the constitutionality of a prohibition against the possession of depictions of actual minors engaged in sexually explicit conduct. The Court did not apply the rule of absolute necessity proposed by respondents. Instead, it held that it was "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Id.* at 109-110. Despite its obvious relevance, respondents avoid any reference to *Osborne* anywhere in their brief. In any event, Congress's findings that new computer technology could make it "almost impossible" for the government to prove its case, and could render the existing prohibitions "unenforceable," S. Rep. No. 358, *supra*, at 20, satisfy respondents' more demanding standard.

Respondents assert (Br. 37) that Congress's assessment of the problem was inadequate because Congress failed to identify any cases in which a child pornographer escaped conviction because the government failed to satisfy its burden of proof. But Congress need not await catastrophic consequences before legislating; to avert serious harms, Congress may rely on reasonable predictive judgments. *Turner Broad. Sys. Inc.* v. *FCC*, 520 U.S. 180, 195 (1997). Congress learned that defendants in a leading prosecution had asserted that the government must refute the possibility that the images they possessed were created using computer technology rather than real minors. S. Rep. No. 358, *supra*, at 17. Congress also learned that the government was able to refute the defense in that case by matching the depictions to pornographic magazines that predated the existence of computer imaging software, but that magazine archives will have increasingly less value since child pornography produced today post-dates the arrival of such software. *Ibid.* Congress therefore had a strong basis for concluding that the very existence of sexual explicit images that are virtually indistinguishable from photographs of real minors engaged in sexually explicit conduct would pose a serious danger to future prosecutions involving recently created child pornography.

Recent experience bears out Congress's judgment. In *United States* v. *Fox*, 248 F.3d 394, 403 (5th Cir. 2001), the government's computer expert admitted on cross-examination that there was no way to determine whether the individuals depicted even exist. That concession did not hinder the prosecution because the defendant was charged under the "appears to be" prohibition. In *United States* v. *Coleman*, 54 M.J. 869 (A.C.M.R. 2001), the court upheld a guilty plea to possession of sexually explicit depictions involving real minors, in violation of 18 U.S.C. 2251 (1994 & Supp. V 1999), because the defendant admitted that he possessed

such images. The court cautioned, however, that "[h]ad appellant pled not guilty and presented evidence that the images were computer-generated, the government may have had difficulty proving that real children were depicted in these images." 54 M.J. at 873.

Respondents argue (Br. 37-38) that, if Congress wanted to restrict a particular reasonable doubt defense that could endanger prosecutions, it should have focused its efforts on that defense. But by prohibiting distribution and possession of depictions that "appear to be" or that "convey the impression" that minors are engaged in sexually explicit conduct, Congress effectively eliminated the problematic defense. Respondents offer no alternative, much less one that could have accomplished Congress's goal as effectively.

Respondents argue (Br. 38) that eliminating the government's burden to prove that depictions involve real children violates the Due Process Clause, because it relieves the government of the burden of proving an essential element of the offense. But the new prohibitions establish new offenses with different elements, and the Due Process Clause simply requires the government to prove beyond a reasonable doubt each element of the new offenses. *In re Winship*, 397 U.S. 358, 364 (1970). Since the involvement of real minors in the depiction is not an element of the new offenses, the Due Process Clause does not require the government to prove it.

Respondents similarly err (Br. 38) in contending that relieving the government of the burden of proving that images are of real children violates the First Amendment. In response to evidence that there is a serious danger that harmful conduct will otherwise escape detection and prosecution, Congress may adopt stricter prohibitions that minimize that risk. For example, in *Burson* v. *Freeman*, 504 U.S. 191 (1992), the Court upheld a state statute that prohibited the solicitation of votes near a polling place in order to guard against voter interference. The Court rejected the argu-

ment that the First Amendment required the State to pursue its interest in preventing interference through a direct prohibition against such conduct, reasoning that "because law enforcement officers generally are barred from the vicinity of the polls * * *, many acts of interference would go undetected." *Id.* at 207.

In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court upheld the constitutionality of a rule prohibiting a lawyer from soliciting a client in person based on the potential for overreaching by the lawyer. The Court concluded that the First Amendment did not require the government to prove overreaching in each case, because "in-person solicitation is not visible or otherwise open to public scrutiny," and "[o]ften there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place." *Id.* at 466

Similarly, in *Ferber*, the Court upheld the application of New York's child pornography law to material produced outside the State in part because "[i]t is often impossible to determine where such material is produced." 458 U.S. at 765-766 & n.19; see also *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351, 2366-2370 (2001) (upholding constitutionality of limits on coordinated expenditures because they minimize the danger that impermissible contributions can be disguised as coordinated expenditures and because directly combating circumvention is difficult as a practical matter); *Hill* v. *Colorado*, 530 U.S. 703, 729 (2000) (upholding constitutionality of a state statute that prohibited all close approaches of another person near a health care facility, not just physically harassing ones, on the ground that "individualized characterization of each individual movement is often difficult to make accurately"); *Regan* v. *Time, Inc.*, 468 U.S. 641, 656-659 (1984) (upholding constitutionality of federal statute that makes it unlawful to publish an image of

the dollar bill unless it is in black and white and 3/4 or 1 1/2 times the size of the bill itself without requiring proof that the image could be used to facilitate counterfeiting); *id.* at 700-704 (Stevens, J., concurring in the judgment in part and dissenting in part).

The principle involved in those cases is controlling here. In order to combat the danger that those who possess and distribute depictions of actual children engaged in sexually explicit conduct will escape detection and prosecution, Congress could constitutionally prohibit the possession and distribution of virtually indistinguishable depictions.

2. The "appears to be" and "conveys the impression" prohibitions are also supported by a second compelling interest—protecting children from becoming victims of abuse by pedophiles. Pedophiles use child pornography to seduce minors into sexual activity, and material that is virtually indistinguishable from depictions involving real children can be as effective in seducing children into sexual activity as depictions of real minors. 18 U.S.C. 2251 note (Supp. V 1999) (Finding 3). The government's interest in protecting minors against such abuse is just as compelling as the government's interest in preventing minors from being used in the production of child pornography. *Ferber*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

Respondents contend (Br. 33) that the First Amendment forbids Congress from relying on a theory that child pornography conveys a message that affects the thoughts and feelings of children. Congress, however, was not concerned with the thoughts and feelings of children as such. Instead, its concern was that pedophiles commonly use child pornography to subject minors to sexual abuse. Congress regarded the material covered by the CPPA as a tool of the crime

of child abuse much like burglars' tools are instruments of the crime of burglary.

That basis for the CPPA is fully consistent with the First Amendment. There is no First Amendment right to show minors the kind of sexual explicit material covered by the CPPA. *Ginsberg* v. *New York*, 390 U.S. 629, 638-641 (1968). Nor does the First Amendment protect the use of speech or writings to commit a crime. *Ferber*, 458 U.S. at 762 (relying on *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Significantly, in upholding a state prohibition against the possession of child pornography, the Court in *Osborne* relied in part on the State's interest in preventing pedophiles from using child pornography to seduce children into sexual activity. 495 U.S. at 111.

Respondents make no effort to explain why the principles involved in *Ginsberg* and *Giboney* and the decision in *Osborne* do not justify Congress's decision to ban the materials covered by the CPPA in order to prevent them from being used to abuse children sexually. Instead, respondents rely on cases (Br. 33) holding that adults cannot be limited to material that is suitable for children and that regulation of speech based on listener reaction is generally disfavored. None of those cases addresses the constitutionality of regulating visual depictions having little or no value based on evidence that they are used as tools for the abuse of children. *Osborne* does address that issue, and it makes clear that it is legitimate for the government to rely in part on that justification to support a prohibition against the possession of child pornography.

Respondents argue (Br. 32) that there is insufficient evidence that material covered by the CPPA has been used to seduce children into sexual activity. The "appears to be" and "conveys the impression" prohibitions, however, cover depictions involving actual minors, and Congress had abundant evidence that such depictions have been used to seduce

children into sexual activity. Gov't Br. 33-37. Moreover, Congress could rely on common sense to conclude that depictions that are virtually indistinguishable from depictions of actual minors children engaged in sexually explicit conduct pose the same danger. Congress also heard expert testimony confirming that common-sense judgment. Gov't Br. 36.

Congress's tool-of-abuse rationale would not justify banning all non-obscene depictions of adults engaged in sexually explicit conduct simply because they too are often used to seduce children. Resp. Br. 25. That category of depictions includes a significant amount of material that has serious value and that does not violate community standards of decency. *Miller*, 413 U.S. at 23. In contrast, the material at issue here has little or no value and almost uniformly violates community standards of decency.

Respondents argue (Br. 34) that the First Amendment requires Congress to vindicate its compelling interest by relying entirely on laws that prohibit sexual abuse. That solution ignores the realities of the situation. The process of seduction takes place in secret, and its victims rarely seek help before it is too late. A prohibition against sexual abuse is therefore inadequate to protect minors from being abused by pedophiles. In order to better protect children from such dangers, it is also necessary to remove from the hands of pedophiles a common tool of abuse.

3. The government's compelling interests are furthered by the CPPA's prohibitions in two additional ways. First, because child pornography is used as a form of currency to purchase additional child pornography, banning the material covered by the CPPA helps to stamp out the market for sexually explicit depictions of actual minors. Second, because pedophiles use child pornography as a mechanism to whet their appetite for sexual abuse, the CPPA's prohibitions further the government's compelling interest in protecting children from such abuse.

a. Respondents argue (Br. 35) that a prohibition against trading material covered by the CPPA for other child pornography would be a more narrowly tailored way to address Congress's concern that material covered by the CPPA fuels the child pornography market. Prohibiting such material from being distributed and possessed, however, is a far more effective solution. If it is not distributed or possessed, there is no risk that it will be exchanged.

Reliance on that rationale also does not lead to the conclusion that non-obscene depictions of adults engaged in sexual explicit conduct could also be banned. Resp. Br. 36. There is no evidence that non-obscene adult material is part of the same market. Moreover, as previously discussed, unlike the material at issue here, much non-obscene adult material has serious value and does not violate community standards of decency.

b. Respondents argue (Br. 33) that the whetting-the-appetite rationale conflicts with cases holding that regulation of speech based on the effect on the viewer is generally disfavored. But that general principle has no application here. Because the depictions have little or no value, the crime is secretive in nature, and the victims lack both the physical ability and maturity in judgment to protect themselves from their abusers, Congress may remove from pedophiles a preferred mechanism for stimulating their appetites for abuse. See also Gov't Br. 31-32.[2]

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[2] Respondents' challenge (Br. 32-36) to the factual predicate for the single-market and whetting-the appetite rationales is also unfounded. There was ample evidence that pedophiles exchange depictions of actual minors engaged in sexually explicit conduct and use such depictions to whet their appetites for sexual abuse. Gov't Br. 38-39. Since the material covered by the CPPA is "virtually indistinguishable" from such material, Congress logically concluded that it posed the same dangers.

D. *The CPPA Is Not Substantially Overbroad*

Respondents contend (Br. 39-45) that the "appears to be" and "conveys the impression" prohibitions are substantially overbroad. But the material covered by those prohibitions consists largely of sexually explicit images of pre-pubescent children or persons who otherwise clearly appear to be under the age of 18. See p. 4, *supra*. Such depictions have little or no value, except to pedophiles, and the government's compelling interests in eliminating their availability overwhelmingly outweighs whatever slight value they may have. The CPPA is therefore not substantially overbroad, and whatever overbreadth may exist may be avoided through case-by-case adjudication. *Ferber*, 458 U.S. at 773-774.

In support of their claim of substantial overbreadth, respondents assert (Br. 39-46) that the "appears to be" and "conveys the impression" prohibitions apply to artistic conceptions of minors in sexual poses, and that the affirmative defense provides inadequate protection. We have already addressed respondents' mistaken view that the CPPA applies to artistic conceptions of minors in sexual poses. We therefore turn to respondents' criticisms of the affirmative defense.

Respondents argue (Br. 42-43) that the affirmative defense is inadequate to protect artists like Jim Gingerich who paint images that come entirely from their minds. Such images, however, are quite unlikely to be virtually indistinguishable from photographs of actual children engaged in sexually explicit conduct. Unless they are, they are not covered by the CPPA in the first place.

Respondents further contend (Br. 43) that the affirmative defense is inadequate to protect persons who are not involved in the production of material because they have no way of knowing whether adults have been used in the production. If the image appears to be a prepubescent minor, or

otherwise clearly appears to be someone under the age of 18, however, there is no such difficulty. In a borderline case, those not involved in the production of the material can check with those who are. Federal law requires the producers of sexually explicit material to create and maintain records of the performers' names and ages, and to attach a statement to such material stating where the records may be found. 18 U.S.C. 2257; see *American Library Ass'n* v. *Reno*, 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 515 U.S. 1158 (1995). If such information is not available, however, rather than running the risk that they will be helping to sustain the child pornography market, persons may simply refrain from distributing or possessing the material.

Respondents argue (Br. 44) that the affirmative defense is inadequate to protect respondents Bold Type Inc., Jim Gingerich, and Ron Raffaelli, because they "possess" the depictions they create and sell, and the affirmative defense does not apply to unlawful possession. Respondents' concern is misguided. The affirmative defense applies to any person who transports, receives, distributes, reproduces for distribution, sells, or possesses with the intent to sell material that might otherwise be covered by the Act. 18 U.S.C. 2252(c) (Supp. V 1999) (affirmative offense applies to persons charged with violating paragraphs (1), (2), (3), or (4)). Respondents each engage in at least one of those activities, and the affirmative defense necessarily applies to the possession of such material incident to engaging in one of those activities. Because possession is an invariable concomitant of those activities, any other interpretation would deprive the defense of any real meaning.[3]

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[3] Because respondents are all engaged in activities as to which the affirmative defense applies, there is no need to decide whether the Constitution requires a similar defense for persons whose possession of adult material is not incident to one of those activities. For the same reason, it

E. *The CPPA Is Not Unconstitutionally Vague*

Finally, respondents err in contending (Br. 45-49) that the "appears to be" and "conveys the impression" prohibitions are unconstitutionally vague. The CPPA's standard for determining coverage is whether a reasonable unsuspecting viewer would consider the depiction to be virtually indistinguishable from a photograph of an actual individual under the age of 18 engaged in sexually explicit conduct. *Hilton*, 167 F.3d at 75; 18 U.S.C. 2251 note (Supp. V 1999) (Finding 5). That standard provides adequate guidance to those who must comply with the law, to law enforcement officers, and to juries.

Respondents contend (Br. 47) that it is inappropriate to derive the applicable standard from congressional findings rather than from the statute itself. But the congressional findings are part of the statute itself. Moreover, the congressional findings simply clarify the meaning of the prohibitions, and it is entirely appropriate to interpret a statute in light of statutory findings. See p. 5, *supra*. Respondents' further assertion (Br. 48) that the "reasonable person" component of the standard has no nexus to the statutory text is incorrect. When Congress referred to the "unsuspecting viewer," 18 U.S.C. 2251 note (Supp. V 1999)

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is not necessary to decide whether possessors who can satisfy the terms of the affirmative defense have the mens rea required for conviction. *Hilton*, 167 F.3d at 75-76. Similarly, because none of the respondents claims to be a creator of computer-generated fictional images that are virtually indistinguishable from photographs of real children engaged in sexually explicit conduct, there is no need to decide whether the Constitution requires some kind of defense for such depictions. The resolution of that question would be particularly premature because respondents have not identified a single example of an entirely fictional computer-generated image (as opposed to one that is morphed from a real minor in an innocent pose) that would satisfy the virtually indistinguishable standard.

(Finding 5), it plainly meant a "reasonable" unsuspecting viewer, not an "unreasonable" one.

Respondents argue (Br. 48) that the standard is still unconstitutionally vague because reasonable persons may disagree about whether the standard is satisfied in particular cases. This Court's obscenity decisions refute that contention. Under those decisions, two of the three prongs of the inquiry—appeal to the prurient interest and patent offensiveness—are decided from the perspective of the "average person, applying contemporary community standards." *Miller*, 413 U.S. at 24, 30. The third inquiry—serious value— is decided from the perspective of a "reasonable person." *Pope* v. *Illinois*, 481 U.S. 497, 501 (1987). In *Miller*, the Court held that its three-part test for determining obscenity is not unconstitutionally vague, explaining that "these specific prerequisites will provide fair notice to a dealer in [obscene] materials that his public and commercial activities may bring prosecution." 413 U.S. at 27. The Court added that "[t]he mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Id.* at 26 n.9; see also *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination [on the first two prongs], just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.").

In any event, the reasonable person test for determining whether material is covered by the CPPA is unlikely to lead to disagreement in the vast majority of cases. Reasonable persons can easily come to a consensus when the image has the characteristics of a prepubescent minor or when the image otherwise clearly appears to be a minor. "That there may be marginal cases in which it is difficult to determine

the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Miller*, 413 U.S. at 28 n.10 (quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947)).

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For the foregoing reasons and the reasons stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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